

## **MEMORANDUM OF UNDERSTANDING FOR PORTLAND HARBOR SUPERFUND SITE**

### **I. PARTIES**

This Memorandum of Understanding (MOU) is entered into by and between the following governmental parties who sign the MOU (Parties):

- the United States Environmental Protection Agency (EPA)
- the Oregon Department of Environmental Quality (DEQ)
- the Confederated Tribes and Bands of the Yakama Nation
- the Confederated Tribes of the Grand Ronde Community of Oregon
- the Confederated Tribes of Siletz Indians
- the Confederated Tribes of the Umatilla Indian Reservation
- the Confederated Tribes of the Warm Springs Reservation of Oregon
- the Nez Perce Tribe
- the National Oceanic and Atmospheric Administration
- the Oregon Department of Fish and Wildlife
- the U.S. Department of the Interior

### **II. PURPOSE**

On December 1, 2000, the Portland Harbor Superfund Site (Site) was listed on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) National Priorities List (NPL). 65 Fed. Reg. 75179-01 (December 1, 2000). The Parties intend through this MOU to provide a framework for coordination and cooperation in the management of the Site to optimize federal, state, and tribal expertise and available resources to:

- A. Ascertain the nature and extent of contamination at, from, and to the Site, and ensure the implementation of an effective cleanup of the Site in a manner consistent with the requirements of CERCLA, 42 U.S.C. §§ 9601 *et. seq.*, the National Contingency Plan (NCP), 40 C.F.R. Part 300, and the Oregon Environmental Cleanup Law, ORS 465.200 *et seq.*, and/or other federal and state laws including the National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.* (NHPA), the Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.* (ARPA), the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 *et seq.* (NAGPRA), ORS 97.740 *et seq.*, or ORS 358.905 *et seq.*, as applicable.

- B. Identify sources of contamination to the Willamette River and implement source control measures as necessary.
- C. Incorporate the expertise of federal agencies which have listed species at the Site pursuant to the federal Endangered Species Act, and of Tribes which have an interest in affected resources. As used in this MOU, "Tribes" and "Trustees" refer to the Tribes and Natural Resource Trustees that are signatories to this MOU. EPA will address through separate agreement(s) the federal trust responsibility to Tribes, tribal consultation, cultural resources, and funding for tribal and Natural Resource Trustee participation. The Parties intend to integrate and coordinate their efforts to achieve protective cleanups and minimize residual ecological risks at the Site to ensure viable restoration activities.
- D. Negotiate and enter into response action agreements with potentially responsible parties (PRPs) subject to federal and/or state oversight for the implementation of the remedial investigation and feasibility studies (RI/FS) for the Site, any appropriate early actions, and the ultimate remedial action for the Site.
- E. Provide procedures to resolve any conflicts between EPA and DEQ regarding implementation of their respective Lead and Support Agency roles for the upland and in-water portions of the Site.
- F. Clarify for all concerned, including the public and PRPs, the Lead and Support Agency roles of EPA and DEQ.
- G. Provide procedures for resolving disputes between the Parties regarding work at the Site.

### **III. AUTHORITY AND APPLICABILITY**

- A. Each Party has authority to enter into this MOU. EPA and DEQ have express statutory authority to respond to releases of hazardous substances related to the Site. The signatory Tribes and other state and federal Parties have express authority as Natural Resource Trustees under CERCLA, and have rights and responsibilities as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. 42 U.S.C. §§ 9601 et. seq.; 42 U.S.C. § 9607(f); NCP, Subpart G; Executive Order 12580, and other applicable laws. Nothing in this MOU shall be construed to restrict, enlarge, or otherwise determine the rights, interests, and jurisdiction of EPA, DEQ, the signatory Tribes, or the signatory Natural Resource Trustees. For the purposes of this MOU, the Natural Resource Trustees are: the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Nez Perce Tribe, the U.S. Department of the Interior,

the National Oceanic and Atmospheric Administration, and the Oregon Department of Fish and Wildlife.

- B. This MOU is effective upon signature by both EPA and DEQ, and effective with respect to any other Party upon submission of that Party's executed signature page for this MOU. Any Party may withdraw from this MOU upon thirty (30) days written notice. This MOU will be regularly reviewed by the Parties and may be modified by written agreement by all Parties.

#### **IV. EPA/DEQ LEAD AGENCY AND SUPPORT AGENCY ACTIVITIES**

A. Upland Portion of the Site

1. DEQ is designated Lead Agency. EPA will be the Support Agency. DEQ may elect for any reason to ask EPA to assume the Lead Agency role for any discrete facility(s) or portion(s) of the upland portion of the Site at any time.
2. DEQ will enter into response action agreements with or issue orders to PRPs pursuant to state authority, which is substantially the same as CERCLA authority, for remedial investigation, early action, and/or source control implementation. DEQ may elect any form of agreement, including voluntary cleanup agreements, which are a regular part of its hazardous waste/hazardous substance cleanup program. EPA may review DEQ agreements or orders. DEQ will consider any comments provided to DEQ on a timely basis. EPA intends to require PRP reimbursement through the in-water consent order of EPA's and DEQ's costs of coordinating uplands source identification and control with in-water investigations. At upland facilities where EPA believes circumstances will warrant significant EPA review or involvement, EPA and DEQ will pursue recovery of EPA's costs through negotiation or amendment of the agreement for that facility. EPA's costs may be recovered through seeking a specific provision in the agreement or, if appropriate, through EPA co-signing the agreement for the sole purpose of recovering its costs. EPA does not intend to co-issue any agreements or orders or grant any relief to any PRPs for any performances thereunder, except where EPA co-signs an agreement or order for the limited purpose of recovering oversight costs.

B. In-Water Portion of the Site

1. EPA is designated Lead Agency. DEQ will be the Support Agency.
2. EPA will use its CERCLA Section 104 authority to issue an Administrative Order On Consent (AOC) for PRPs to voluntarily perform a remedial

investigation/ feasibility study, or compel such work with a Unilateral Order pursuant to CERCLA Section 106. Any early action work will be pursuant to orders, consensual or unilateral, issued pursuant to Section 106, and any agreement to perform CERCLA remedial action will be embodied in a Consent Decree (CD) entered in the Federal District Court of Oregon in accordance with Sections 104 and 122 of CERCLA.

C. Coordination

1. EPA and DEQ do not intend to attend one another's agreement or order negotiations for RI/FS work, but will receive, along with the Tribes and Natural Resource Trustees, deliverables submitted by PRPs pursuant to each other's agreements and orders. EPA and DEQ will regularly review the implementation activities of the other in Technical Coordinating Team (TCT) meetings with the Tribes and Natural Resource Trustees.
2. DEQ will assign Lead Remedial Project Managers (RPM) to oversee the investigation and remediation of upland contamination, provide Support functions, and serve as the main point of contact for EPA, the Tribes, and Natural Resource Trustees. EPA will also assign a Lead RPM to oversee the investigation and remediation of in-water contamination, provide Support functions, and serve as the main point of contact for DEQ, the Tribes, and Natural Resource Trustees. DEQ's present Lead RPMs are Eric Blischke and Kim Cox (Tribes/community). EPA's present lead RPM is Wallace Reid.
3. A TCT is established by this MOU to be the principle means of coordination and communication of data and information concerning Site management by the respective Lead Agencies and Tribes and Natural Resource Trustees, and to identify and resolve implementation issues. To the extent that issues are presented but not resolved by the TCT, the Parties will follow the dispute resolution procedures set forth in Section V of this MOU.
  - a. The TCT will be made up of representatives who serve as the key contact for their respective governmental entity. The designated TCT representatives for EPA and DEQ are:  
  
For EPA: Wallace Reid  
  
For DEQ: Eric Blischke (RPM)  
Kim Cox (tribal/community relations)

The signatory Tribes and Natural Resource Trustees will identify representatives by separate designation to the TCT.

- b. The EPA RPM will act as the convener of the TCT, but any TCT representative may initiate a meeting of the TCT. The EPA Lead RPM will maintain a record of all decisions of the TCT, and note agreements and disputes among the representatives.
  - c. TCT representatives will coordinate and provide technical comments from their respective entities on all Site matters, coordinate and disseminate information relating to the Site, and discover and resolve problems among the representatives.
  - d. Each representative of the TCT may designate an alternate who will attend TCT meetings in the member's absence and serve in the same capacity as the designated representative.
  - e. The Lead Agency will ensure that the Parties are provided copies of key documents to support meetings and deliberations.
  - f. The TCT will be notified of any dispute resolution provision that is invoked by a PRP under an agreement or order, and of any proposed material modifications to an agreement, order, SOW or work plan.
4. A Legal Coordinating Team (LCT) is established by this MOU to identify, coordinate, and resolve legal strategy, compliance, and enforcement issues which may arise during the investigation and cleanup of the Site.
- a. The LCT will be comprised of attorney representatives for EPA, DEQ, Tribes, and Natural Resource Trustees. The LCT representatives for EPA and DEQ are:  
  
For EPA: Elizabeth McKenna  
  
For DEQ: Kurt Burkholder  
  
The signatory Tribes and Natural Resource Trustees will identify representatives by separate designation to the LCT.
  - b. The EPA attorney representative will serve as convener of the LCT. The LCT convener will call a meeting at the request of any LCT representative.

- c. Each LCT representative may designate an alternate.
5. The TCT and LCT may agree to a schedule for meetings. In any event, at least five working days notice will be provided by the convener of the TCT or the LCT for any meeting to be held by either group. Agendas for meetings will be faxed or e-mailed by the convener to the TCT or LCT representatives sufficiently in advance of the meeting to allow representatives to meaningfully participate. Meetings of the TCT or LCT may be by teleconference for some or all representatives, as appropriate under the circumstances.
6. While meetings of the TCT and LCT are intended to facilitate coordination between federal and state agencies, Tribes, and Natural Resource Trustees, the TCT and LCT are not the sole means by which EPA and DEQ may coordinate their activities. Further, participation in the TCT and LCT does not preclude meetings between agencies and Tribes as appropriate to government-to-government relations. The Tribes and Natural Resource Trustees may communicate to the Lead Agencies data and information needs that the Tribes or Natural Resource Trustees consider necessary to complete and implement a comprehensive RI/FS and remedial action at the Site. The Tribes and Natural Resource Trustees may also provide information and data to the Lead Agencies that they want considered, including, but not limited to, the identification of applicable or relevant and appropriate requirements. By communicating such information to the Lead Agencies, the Tribes and Natural Resource Trustees in no way waive any authority or obligation under CERCLA or any other federal or state law.
7. DEQ and EPA will coordinate in-water and upland public and tribal outreach and involvement, including revision of the draft Portland Harbor Public Involvement Plan to reflect current management of investigations and cleanup.
8. The Lead Agency retains its statutory decision-making authority and obligations for areas under its management.
9. Any entity may change its TCT or LCT representative upon five working days' written notice.
10. The Parties will meet annually to evaluate the effectiveness of the MOU, review activities under this MOU and other related activities of the Parties, and allow the Parties' policy makers to discuss how the cleanup is progressing.

D. Negotiations With PRPs

1. In-Water

- a. During RI/FS AOC and RD/RA consent decree negotiations for the in-water portion of the Site, the TCT and LCT will meet in person or by teleconference separately and/or together: (1) a minimum of 10 working days before the start of negotiations with the PRPs, to discuss negotiation goals and strategies and to review drafts of the AOC and CD and attachments that EPA will present to the PRPs at the outset of its negotiations; (2) upon conclusion of negotiations with the PRPs, but prior to signature by the parties to the AOC or CD; and (3) such other times as a representative to the TCT or LCT deems review of proposed terms appropriate.
- b. EPA will hold regular conference calls with the LCT during AOC and CD negotiations to provide updates on the progress of AOC and CD negotiations, including notifying the LCT of any significant issues raised by the PRPs during the negotiations. EPA will provide to the LCT and/or TCT key documents generated by EPA or provided to EPA by the PRPs during the negotiations and provide the LCT and/or TCT adequate time for consideration and comment on such documents consistent with the established negotiation schedule.
- c. All representatives to the TCT and LCT agree to coordinate review and comment on the AOC and CD with EPA's statutory schedule for the conclusion of negotiations.
- d. EPA will negotiate and require PRPs to enter an AOC containing provisions consistent with this MOU and requiring PRP reimbursement of DEQ's direct and indirect costs incurred as Support Agency for oversight activities relating to the RI/FS conducted under the AOC.
- e. All contacts with PRPs regarding the substance of EPA's in-water agreement negotiations will be through EPA.

2. For Uplands Investigations.

- a. DEQ will provide the TCT and LCT for review and comment representative models of the agreements and orders, consensual and unilateral, which DEQ anticipates using in the future. Upon request, DEQ also will provide copies of existing agreements and orders.

- b. DEQ will hold regular conference calls with the LCT during agreement negotiations to provide updates on the progress of agreement negotiations, including notifying the LCT of any significant issues raised by the PRPs during the negotiations. DEQ will provide to the LCT and/or TCT key documents generated by DEQ or provided to DEQ by the PRPs during the negotiations and provide the LCT and/or TCT adequate time for consideration and comment on such documents consistent with the established negotiation schedule.
- c. All contacts with PRPs regarding the substance of DEQ's uplands agreements negotiations will be through DEQ.
- d. DEQ will negotiate and require PRPs to enter into agreements containing provisions consistent with this MOU.

E. Site Investigatory and Remedial Phase Implementation

1. In-Water

- a. Deliverables submitted to EPA by PRPs pursuant to the AOC and CD will either be simultaneously submitted to TCT and LCT representatives by the PRPs, or promptly provided to TCT and LCT representatives by EPA. TCT and LCT representatives may specify deliverables to be distributed. Any comments provided to EPA must be provided in a timely manner.
- b. The TCT and LCT will meet a reasonable time prior to regularly scheduled meetings with PRPs to discuss work plans and deliverables under the AOC or CD, the progress of performance under the AOC and CD, and comments on any deliverables submitted for review. Members of the TCT or LCT may be present at implementation meetings between EPA and the PRPs.
- c. The TCT, and where appropriate, the LCT, will be provided adequate time given the schedule established for submittal of deliverables to exchange written draft comments on PRPs' submittals. Any comments provided to EPA must be provided in a timely manner.
- d. Prior to providing written approval for all interim and final deliverables required by the AOC, CD, and/or Scope of Work for the Site, EPA will consult with each of the representatives to the TCT.



## 2. Uplands

- a. The TCT, and LCT as appropriate, will meet regularly to discuss the progress of upland cleanups, with specific emphasis on efficacy of source control of contaminants to the river. The TCT may establish a schedule for milestones, and use milestone reports to track progress of source control measures.
- b. Deliverables submitted to DEQ by PRPs pursuant to DEQ agreements or orders will either be simultaneously delivered to TCT and LCT representatives by the PRPs or be promptly distributed to TCT and LCT representatives by DEQ. TCT and LCT representatives may specify deliverables to be distributed. The TCT, and where appropriate, the LCT, will be provided adequate time given the schedule established for submittal of deliverables to exchange written draft comments on PRPs' submittals. Any comments provided to DEQ must be provided in a timely manner.
- c. In order to ensure technical coordination with in-river work, ensure NCP consistency, and address tribal and natural resource trustee concerns, EPA will provide review and comment on key PRP deliverables for upland facilities and DEQ proposed decisions regarding source control at upland facilities.

## F. Uplands Source Control

1. DEQ and EPA will jointly develop a source control strategy. The strategy will define a process for identifying and controlling potential sources of contamination, including but not limited to:
  - a. Hazardous substance releases at upland sites
  - b. NPDES discharges
  - c. Stormwater discharges
  - d. Upstream sources
2. DEQ will submit proposed source control decisions to EPA. EPA will provide review and comment on key proposed source control decisions within a time frame determined by the agencies to be compatible with the work schedule for the Site involved. Such DEQ decisions will include:
  - a. Determination whether an upland site is a current source of contamination to the river and sediments.
  - b. Selection of a source control measure.

- c. Determination that a source control measure has been satisfactorily performed.
- 3. Annually, DEQ will prepare and provide to EPA and the TCT a milestone report summarizing the status of DEQ source control activities. Key information to be summarized will include:
  - a. Sources identified.
  - b. Source control measures implemented.
  - c. Status of ongoing source control measures.
  - d. Completed source control measures facilities.

G. Cultural Resources

- 1. EPA and DEQ recognize the significance of cultural resources to the signatory Tribes and are committed to the principle that management of the Site be undertaken in compliance with applicable laws related to cultural resources, which may include the National Historic Preservation Act of 1966, 16 USC 470 et seq., the Archeological Resources Protection Act, 16 USC 470aa et seq., the Native American Graves Protection and Repatriation Act of 1990, 25 USC 3001 et seq., ORS 97.740 et seq., or ORS 358.905 et seq.
- 2. EPA and DEQ will consult with the Tribes regarding the potential existence of cultural resources at upland and in-water portions of the Site, and develop a strategy in consultation with the Tribes for cooperative efforts to ensure compliance at the Site with applicable laws related to cultural resources. Such efforts may include, for example, PRP performance of cultural resource surveys and incorporation of cultural resource-related tasks in statements of work.
- 3. For in-water investigations and remedial measures, and any other work for which EPA is the Lead Agency, EPA will ensure compliance with laws related to cultural resources applicable to those activities. EPA will consult with Tribes on appropriate steps to take. The Tribes will identify tribal laws and policies that are applicable or relevant and appropriate.
- 4. For upland investigations and remedial measures performed by PRPs under DEQ oversight, DEQ will notify the PRP of laws related to cultural resources that might be applicable to the PRP's activities and, to the extent of its authority, ensure PRP compliance with such laws before the PRP's work proceeds. For any upland investigative or remedial measures performed by DEQ or its contractor, DEQ will ensure compliance with cultural resource laws applicable to those activities. For any cultural

resource law that is beyond DEQ's authority to enforce or that poses only a federal agency duty, DEQ will facilitate compliance with that law consistent with the cultural resource strategy developed with the Tribes and EPA. Such facilitation may include, for example, coordination of upland work schedules with necessary cultural resource measures, or DEQ withholding approval necessary for upland work to proceed until cultural resource laws are satisfied. DEQ will consult with the Tribes on appropriate steps to take. The Tribes will identify tribal laws and policies that are applicable or relevant and appropriate.

5. Nothing in this section regarding cultural resources is intended to enlarge, restrict, or otherwise affect any Party's rights or obligations regarding cultural resources under any law.

H. Lead Agency Cleanup Decision making

Ultimate remedial action decision making authority shall be expressed in Record(s) of Decision in accordance with the NCP or ORS Ch. 465, as applicable.

**V. DISPUTE RESOLUTION**

- A. With respect to both the upland and in-water contamination investigation and remediation, the Parties will use their best efforts to resolve disagreements informally within the TCT or the LCT.
- B. If the Parties do not reach agreement through informal means, the Parties will use the following dispute resolution process:

1. Any unresolved technical dispute will be promptly elevated to the first-line managers of the RPMs for DEQ and EPA. Any Party may have a representative participate in discussions on the dispute in person or by phone, or may provide a written statement of position for consideration.

For DEQ: Program Manager, presently Mike Rosen

For EPA: Unit Manager, presently Amber Wong.

2. If the Parties continue to disagree, the matter will be elevated to the next level of management at DEQ and EPA. Any Party may have a representative participate in discussions on the dispute in person or by phone, or may provide a written statement of position for consideration.

For DEQ: Northwest Regional Division Director, currently Neil Mullane.

For EPA: Deputy Division Director, Michelle Pirzadeh.

3. If the Parties continue to disagree, the matter will be elevated to the EPA Regional Administrator and DEQ Director, who will resolve the matter or decide the appropriate forum or means of ultimate resolution. Any Party may provide a statement of position to EPA and DEQ for consideration in the resolution of the dispute.
- C. To avoid any significant disruption to work, disputes must be resolved as expeditiously as possible. When informal dispute resolution between the RPMs does not rapidly resolve a dispute, the RPMs will elevate the dispute through the various levels of management within ten working days. Generally, the agencies will strive to resolve disputes within 15 working days.
- D. This Dispute Resolution provision does not preclude separate government-to-government consultation between the Tribes, the State, and EPA or the other federal agencies.
- E. Work that is unrelated to a dispute will continue during dispute resolution or government-to-government consultation. Work that is the subject of the dispute or consultation, or dependent on the outcome of the pending dispute or consultation, will not proceed until the dispute or consultation is resolved, unless delaying the work could pose an imminent and substantial endangerment to human health, welfare, or the environment. The dispute resolution and government-to-government consultation procedures related to any work on a critical time path will be expedited so as to be consistent with schedules set forth in the AOC, agreement, or other relevant scheduling document.

## **VI. CONFIDENTIALITY**

The Parties recognize that to effectively and efficiently exercise their authorities concerning the Site, their counsel, employees, and consultants may exchange documents and information subject to attorney-client privilege, attorney work product, and other forms of privilege. The Parties intend to keep certain information shared under this MOU confidential. To avoid interference with a potential enforcement proceeding in which the parties have a common interest, the parties will protect from disclosure any law enforcement records exchanged in anticipation of litigation. The Parties agree to protect these privileges, to the full extent permissible under applicable law. The Parties will make every effort in accordance with law to maintain the confidentiality of cultural resource information that a signatory Tribe identifies as sensitive. A Party who cannot protect the confidentiality of a document will decline and/or return the document to the originator. This provision shall remain in effect after this MOU terminates.

Whenever sharing information deemed confidential, the Party shall clearly mark any information to which it asserts a privilege as "Privileged and Confidential Information Do Not Release Without Authorization." The Party receiving information so marked agrees not to release, or allow to be released, such information to a non-party, to the extent permitted by law. The Parties agree that failure to so mark information developed or shared under this Agreement does not preclude the parties from asserting the protections under the Freedom of Information Act or Oregon law, or from asserting privileges and exceptions in seeking to protect the information from discovery.

## **VII. GENERAL PROVISIONS**

- A. Nothing in this MOU is intended to either create any right in or grant any cause of action to any person not a Party to this MOU or to release or waive any claim, cause of action, demand, or defense in law or equity that any Party to this MOU may have against any person(s) or entity that is or is not a party to this MOU. This MOU is not a fund obligating document. Any reimbursement to PRPs or contribution of funds will be handled in accordance with applicable law and procedures.
- B. EPA and other federal agencies have a unique legal relationship with tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. Federal policies instruct EPA to have regular and meaningful consultation with Indian tribal governments when developing policies and regulatory decisions on matters affecting their communities and resources, including Executive Order 13175 on Consultation and Coordination with Indian tribal Governments, effective January 6, 2001; President Clinton's memorandum of April 29, 1994 on Government-to-Government Relations with Native American tribal Governments; and the EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984.
- C. Nothing in this MOU is intended to preclude separate government-to-government consultation between a signatory Tribe, the State, and EPA or other federal agencies pursuant either to federal Indian law and policies, or any separate government-to-government consultation agreement(s) between EPA and a signatory Tribe.
- D. The Parties recognize that each Party reserves all rights, powers, and remedies now or hereafter existing in law or in equity, by statute, treaty, or otherwise. Nothing in this Agreement is or shall be construed to be a waiver of the sovereignty of a signatory Party. This Agreement is intended solely for the purposes of facilitating inter-governmental cooperation between the Parties, and creates no rights in third parties or the right to judicial review.

- E. EPA and DEQ will provide each other advance notice of any contemplated response enforcement or cost recovery action concerning Portland Harbor, and coordinate with and assist each other in such actions as appropriate.
- F. DEQ reserves the opportunity to request federal funds for state-lead removal actions and to seek cost-share credit for state-financed remedial actions. Nothing in this MOU waives or supersedes any state right under CERCLA regarding ARARs, ROD concurrence, and consent decree participation.